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No. 88-1725

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

JUAN FRANCISCO VENEGAS,
Petitioner,

VS.

MICHAEL R. MITCHELL,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether a plaintiff who is awarded reasonable attorney's fees under the 1976 Civil Rights Attorney's Fee Awards Act, 42 U.S.C. § 1988, can, by virtue of a contingent fee agreement, be required to pay his attorney amounts in excess of the awarded fees.

2. Whether a plaintiff who is awarded reasonable attorney's fees under 42 U.S.C. § 1988 can, by virtue of a contingent fee agreement, be required to pay his attorney amounts grossly in excess of the awarded fees when the attorney withdrew from the case prior to the appeal and the attorney did not fully advise the plaintiff of his rights under 42 U.S.C. § 1988.

3. Whether a federal court in a civil rights case can uphold the reasonableness of a contingent fee agreement between the plaintiff and his attorney when that agreement would not be enforceable under state law.

LIST OF PARTIES NOT OTHERWISE NOTED IN THE TITLE

Parties defendant in the lawsuit at the time of the motion to intervene by Respondent were Ronnie J. Skaggs and Carthel S. Roberson. Others who are directly affected by or claim to have an interest in the matter are Johnnie L. Cochran, Jr., Kenneth Roberson, Stephen Yagman and Marion Yagman.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 867 F.2d 527. The memorandum of decision and order, filed January 23, 1987, and the correcting order, filed February 9, 1987, of the United States District Court for the Central District of California are not reported.

JURISDICTION

The judgment of the Court of Appeals was rendered on January 31, 1989. A petition for rehearing with a suggestion for rehearing *en banc* was denied on April 4, 1989. A timely motion to stay issuance of the mandate was filed

and was granted on April 19, 1989. The petition for a writ of certiorari was filed on April 24, 1989 and was granted on October 2, 1989. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved is the Civil Rights Attorney's Fee Award Act of 1976, 42 U.S.C. § 1988 ("§ 1988"), which provides in part as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE[1]

On December 25, 1971, Petitioner, Juan Francisco Venegas ("Venegas") was arrested with Lawrence Reyes for the murder of William Staga. After a trial by jury, they were both convicted and sentenced to life in prison. The California Supreme Court reversed Venegas' conviction on the ground of insufficiency of the evidence. *People v. Reyes,* 12 Cal. 3d 486, 116 Cal. Rptr. 217, 526 P.2d 225 (1974). The facts related to the case are contained in that opinion. *See also* Reporter's Transcript on Appeal ("RT") Vol. 1 p. 83 — Vol. 2 p. 35. Venegas served more than two and one-half years in State Prison. RT Vol. 3 p. 129.

[1]On October 30, 1989 the Court granted Petitioner's motion to be relieved from filing a joint appendix.

Thereafter Venegas filed a state court tort action against the City of Long Beach and several Long Beach police officers,[2] and on October 28, 1977, he filed a complaint in the United States District Court under 42 U.S.C. §§ 1983 and 1985 against Long Beach police officers alleging that they intentionally produced false and perjured evidence. Record on Appeal, Document No. (hereafter "R") 1.

On July 6, 1981, the district court granted defendants' motion for summary judgment on the ground that the action was barred by the statute of limitations. The Court of Appeals reversed the judgment. *Venegas v. Wagner,* 704 F.2d 1144 (9th Cir. 1983).

In 1985, Venegas was required to find a new attorney. He retained the firm of Yagman & Yagman, which remained as counsel until September, 1985. R 236 (Notice of Motion for Attorney's Fee Award, Declaration of Stephen Yagman p. 4a); R 240 (Declaration of Marion Yagman p. 1); R 242 p. 2.

Thereafter in September of 1985 Venegas and Respondent Michael R. Mitchell ("Mitchell") had discussions about Mitchell representing Venegas in the case then set for trial on November 5, 1985 (R 260 p. 10, R 254 (Declaration of Venegas p. 1)) which resulted in Mitchell and Venegas executing a contingent fee agreement. R 260

[2]The California Court of Appeal reversed a $1 million verdict in favor of Venegas. *Juan Venegas v. City of Long Beach, et al.,* 2d Civil No. 66285, Court of Appeal, Second Appellate District, Division Three (1983) (unpublished opinion), and Respondent was aware of this fact. RT Vol. 5 pp. 46-47.

p. 13.[3] (*See also* appendix to Opposition to Brief in Opposition to Petition for Writ of Certiorari.)

The agreement, dated September 18, 1985 (*Id.*), provided that Venegas would hire Mitchell to prosecute Venegas' civil rights lawsuit. Inserted in a paragraph was the following: "This agreement covers one trial only. In the event there is a mistrial or an appeal, the parties may mutually agree upon terms and conditions of Attorney's employment, but are not obligated to do so." ¶ 2. Venegas agreed to pay Mitchell a $10,000 non-returnable retainer and "Forty Percent (40%) of the gross amount recovered (prior to any deductions for costs) less the nonrefundable retainer fee actually paid." ¶ 4. Venegas was to pay all costs and expenses. The agreement further provided that "the contingent fee payable to Attorney shall be calculated based on the gross amount *recovered* prior to any deduction for costs or expenses incurred or advanced." ¶ 5 (emphasis added). The agreement added in ¶ 8 that

> [T]he right to apply for and collect any attorney fee award made by a court is Attorney's and not Client's right. Client understands and agrees that Client has no right to nor shall client attempt to waive or waive Attorney's right to apply for and collect attorney's fees. In consideration for Client's agreements, Attorney agrees that Attorney shall make appropriate applications for attorneys fees in the lawsuit. Attorney and Client agree that to the extent that attorneys fees are awarded and recovered by Attorney, the same shall, dollar-for-dollar, reduce Client's obligation to pay (or shall be refunded to Client if previously paid) attorney fees to Attorney pursuant to Paragraph 4 above. Any attorneys fees awarded by a court in excess of the amount which Client is obligated to pay pursuant to paragraph 4 above is the property of and shall be paid to Attorney.

[3]By that time pleadings and discovery had been completed. *See, e.g.*, RT Vol. 4 pp. 5, 65, 100; R 236 (Exhibit 1 to Declaration of Mitchell).

Venegas understood that Mitchell would be obligated to handle any appeal in order to obtain his fee out of amounts "recovered." Venegas declared that Mitchell told him that the court awarded fees "were his [Mitchell's] and that they never amounted to anything and that he never collected those fees." R 254 (Declaration of Venegas p. 1). Mitchell denied telling Venegas that court-awarded attorney's fees never amounted to anything, but admitted he told him, "I had never successfully collected those fees." R 256 p. 13. There is no evidence that Mitchell advised Venegas that the Civil Rights Attorney's Fee Awards Act had been passed to permit Venegas to obtain an attorney at no cost to himself. *Id.* Mitchell denies he gave Venegas any reason to understand that Mitchell was obligated to handle the appeal. *Id.*

Thereafter Venegas agreed to Mitchell bringing in an additional attorney who would receive half of Mitchell's contingency. R 254 (Declaration of Venegas p. 2).

The trial lasted about one week. RT Vols. 1-7. On February 28, 1986, the court entered judgment on a jury verdict which was unanimous (RT Vol. 7 pp. 60-61) for Venegas in the amount of $2.12 million in damages against the defendants for violations of 42 U.S.C. § 1983. After post-trial motions, two defendants remained subject to a judgment of $2.08 million. R 242 p. 2.

In the application for attorney's fees, the attorneys *requested* a total of $86,760. R 236 p. 1; R 235 p. 1. There

is no indication that in connection with the fee application, they disclosed to the court the terms of the contingent fee agreement or that the fee under that agreement would exceed $800,000. R 236 (Declaration of Mitchell p. 3); R 235 (Declaration of Roberson p. 2). Mitchell had requested a fee based only on an hourly rate. The motion for fees was opposed by the defendants. R 238.

In connection with the application for attorney's fees, the district judge determined the lodestar by multiplying the hours expended by an hourly rate. This amounted to a total of $71,710. The court then applied a multiplier because of the "excellent results obtained and contingent nature of the case" and thus awarded total attorney's fees in the amount of $117,000. The award consists of specific amounts for each of plaintiff's attorneys so that each attorney is entitled to the specific amount awarded him or her. These sums were to bear interest, compounded annually. The court concluded, "This award is reasonable in light of all of the circumstances of this case." R 242 pp. 5-7.

A judgment was entered based on the findings. R 243. Thereafter Mitchell refused to handle the appeal unless he received additional compensation. R 254 (Declaration of Venegas p. 2); R 256 pp. 13-14.

While still counsel of record, on September 23, 1986, Mitchell moved the District Court for leave to intervene to confirm a lien for his services based on the contingent fee agreement. R 260. Venegas contended that the attorneys were not entitled to greater fees than those awarded and determined by the court to be reasonable pursuant to 42 U.S.C. § 1988, and that the contingent fee agreement was invalid under state law. R 254 pp. 1-9; RT Oct. 20, 1986 p. 10. Venegas asserted that the attorneys are entitled to no more than the $117,000 awarded by the

court, while under Mitchell's theory, he and his co-counsel would be entitled to 40% of the amount recovered — a sum in excess of $800,000.[4] *Id.* (It should be recalled that the attorneys had collectively only requested the court to award fees to plaintiff in the amount of $86,760.)

Venegas was compelled to obtain new counsel to represent him on the appeal. On November 12, 1986, a stipulation was executed providing that new counsel was substituted in to replace Mitchell and his co-counsel. R 269.

On January 29, 1987, the district court entered its order denying Mitchell's right to intervene to confirm a lien. The district court, although recognizing it had the power to " 'supervise fee awards under contingent fee arrangements to avoid unreasonable results' " (R 263 p. 14) refused to reduce or eliminate any rights Mitchell purportedly had under the contingent fee agreement. The court stated that "Plaintiff's rights under Section 1988 have not been affected in any way by the contingent fee contract" and that "Mitchell's contingent fee does not constitute a windfall." *Id.* at 15. Thus, the district court concluded that a contingent fee agreement was not unen-

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[4]The Court is requested to take judicial notice (under Rule 201(f) of the Federal Rules of Evidence) of the complaint filed on March 7, 1988 in Los Angeles Superior Court ("LASC") (Case No. C 67886) by Mitchell against Venegas and his present counsel of record, for, *inter alia*, settling the case with the City of Long Beach (including the state case) after the decision of the Ninth Circuit, without Mitchell's and his co-counsel's consent, *(Johnnie L. Cochran, Jr.; The Law Offices of Johnnie L. Cochran, Jr., A Professional Corporation; Michael R. Mitchell, Plaintiffs v. Juan Francisco Venegas, Michael Bromberg, The City of Long Beach, California, and Does 1 through 20, Defendants)*, and the Yagmans' suit against Venegas for additional fees. LASC No. WEC 120719.

forceable solely because the amount of fees under it would exceed the amount awarded by the court. *Id.* at 15-17.

On February 23, 1987, Venegas filed a notice of appeal (Docket No. 87-5662) from so much of the order as refused to reduce the fees of the former attorneys to the § 1988 award. R 265.

On February 24, 1987, Mitchell filed a notice of appeal. Docket No. 87-5684; R 266. On November 9, 1987, the Ninth Circuit affirmed the original judgment of the trial court with respect to the damages, the motion for judgment notwithstanding the verdict, and the attorneys' fee. *Venegas v. Wagner*, 831 F.2d 1514 (9th Cir. 1987).

In the Ninth Circuit, in connection with the dispute with Mitchell, Venegas contended that under federal and state law the attorneys were entitled only to the reasonable fees awarded by the district court to plaintiff under § 1988.

On January 31, 1989, the Ninth Circuit reversed the district court's denial of the motion to intervene, affirmed that court's refusal to reduce the contingent fee to the court-awarded fee, and remanded the case to the district court.[5] The Ninth Circuit held that the amount of court-awarded fees did not limit the amount to which an attorney is entitled under a contingent fee agreement and that in this case, the district court did not err in finding the contingent fee agreement reasonable. On February 13,

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[5]The court noted that in order to confir a lien, "the district court would need to decide whether the contingent fee agreement is valid under California state law and, if so, whether Mitchell and Venegas intended that Mitchell enjoy an equitable lien upon the judgment." 867 F.2d at 531 n.3, 534. As to the subsequent history, *see* Petitioner's Reply Brief in Support of the Petition for Writ of Certiorari p. 2.

1989, Venegas filed a timely petition for rehearing and a suggestion for rehearing *en banc*.

The petition for hearing was denied, and the suggestion for rehearing *en banc* was rejected on April 4, 1989.

SUMMARY OF ARGUMENT

To require civil rights plaintiffs to pay to their attorneys more than the court-awarded fees because of contingent fee agreements would be contrary to the purposes of § 1988 and to public policy. By virtue of its own power and of § 1988, this Court should preclude the payment of unreasonable fees. Clearly a contingent fee which exceeds what a court has determined to be reasonable is unreasonable. Courts have the power to regulate attorney-client contracts, and courts have been particularly assertive in evaluating the enforceability of contingent fee agreements in the light of public policy.

This Court in *Blanchard v. Bergeron*, ____ U.S. ____, 109 S.Ct. 939 (1989), held that a contingent fee agreement did not impose a ceiling upon the amount of a court awarded fee which would go to the attorney. If the contingent fee agreement can be ignored for the benefit of the attorney so that he can receive a larger, reasonable fee, such an agreement should also be ignored for the benefit of the client so that he only has to pay a reasonable fee.

Enforcement of contingent fee agreements that result in fees greater than court-awarded fees involves the very problem which the Court in *Blanchard* sought to eliminate — the incentive of attorneys in civil rights cases to pursue large damages at the expense of injunctive or declaratory relief or even a reasonable settlement.

The history of § 1988 and statistics show that to preclude the enforcement of contingent fee agreements will have no effect on the availability of civil rights lawyers.

Section 1988 itself provides a basis for not enforcing the contingent fee agreement. The legislative history indicates that the intent of Congress was that the fee award establish fully the attorneys' right to compensation and that plaintiffs should not have their recoveries reduced by obligations to their attorneys. Under *Blanchard,* it was never anticipated that when the contingent fee is less than the award, the plaintiff can keep the difference. Thus it follows that a plaintiff should not be obligated to pay the attorney more than the court-awarded fee.

It would be anomalous if civil rights plaintiffs with small or no damages incur no obligation to their attorneys and are made whole but severely damaged civil rights plaintiffs are not made whole because of a large obligation to their attorneys. Another irony of Respondent's position is that a successful civil rights plaintiff may pay more in attorney's fees than the wrongdoing defendant. A civil rights plaintiff should not have the financial obligation of enforcing civil rights laws. In reviewing the legislative history and public policy, circuit courts have held that § 1988 fee awards limit what attorneys can recover under their contingent fee contracts. *Cooper v. Singer,* 719 F.2d 1496 (10th Cir. 1983) *(en banc); Wheatley v. Ford,* 679 F.2d 1037, 1042 (2d Cir. 1982).

Even if there are occasions when the attorney may obtain a contingent fee in excess of the § 1988 fee award, it is inappropriate for the court to approve of such a fee under the circumstances of this case. The contingent fee agreement is manifestly one-sided and unfair on its face. It is also unfair under the circumstances under which it was executed. There was not adequate disclosure of the

extent and likelihood of a § 1988 award. The contingent fee exceeds by a multiple of 10 both the attorneys' lodestar and the fees they requested. The district court-awarded fee included a substantial bonus — in part for the contingency factor. The contingent fee, if upheld, would provide Mitchell and his co-counsel with over $2300 per hour. This fee would be for a one week trial. The attorneys had to undertake no discovery and prepare no pleadings. All the risk was on Venegas, who paid Mitchell a nonrefundable retainer and could be obligated for defendants' fees if he lost. The case had been tried once before by different counsel and resulted in a large award, only to be reversed. So not only was the case already prepared, but a large award was likely. The attorney stopped rendering all services after the District Court level, thereby leaving the client to retain new counsel for an appeal, possible retrials and collection of the judgment. Yet the attorneys claim a vested right in over $800,000. This is unfair and contrary to law and public policy.

The federal court should not uphold a contingent fee contract which clearly is unenforceable under state law. The attorney refused to handle the appeal. The contract provided that the contingency was the recovery of monies. Whether or not the attorney was required to handle the appeal, he was obligated to insure the recovery of monies. As he did not fulfill his obligations, at best, he was entitled to a *quantum meruit* recovery — which would match the reasonable fee awarded by the court.

ARGUMENT

Congress enacted § 1988 in response to the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975) , which held that a party

generally could not recover attorney's fees from the losing party without statutory authorization.

One authority has noted:

> Although simple in its concept and terms, 42 U.S.C. § 1988 has proven to be extraordinarily complex and controversial in its interpretation and application. The growing importance of statutory attorney's fees in civil rights litigation and the absence of clear answers in the statute and its legislative history to a number of important questions have led to considerable confusion within the ranks of the civil rights bar and sharp differences among the lower federal courts. Confronted by persistent questions and conflicts, the Supreme Court has been induced to decide more than a dozen cases bearing on § 1988 fee issues since the enactment of the statute 10 years ago. The result has been the creation of a substantial body of judge-made law concerning the meaning and application of § 1988 and similar fee-shifting statutes, as the Supreme Court seeks to simplify the fee-setting analysis and to "impose some coherence on the diaspora of case law."

M. Schwartz & J. Kirklin, *Section 1983 Litigation: Claims, Defenses, and Fees* 321-22 (1986).

It is the obligation of federal courts under their supervisory power to insure that civil rights plaintiffs are not obligated to pay their attorneys unreasonable fees. In addition, a purpose of § 1988 is to make sure that successful civil rights plaintiffs do not have to sacrifice part of their awards in order to pay their attorneys. This is done by providing for the awarding of reasonable attorney's fees.

Venegas contends that by virtue of § 1988 and its purpose, as well as of the courts' supervisory power, an attorney in a civil rights case is not entitled to fees under a contingent fee contract which exceed the amount of the court-awarded fees under § 1988. The facts demonstrate in general and in this case the unfair and unintended consequences of a decision permitting an attorney to obtain as a result of a contingent fee agreement an amount in excess of the § 1988 court-awarded fee.[6]

I

THE PLAINTIFF WHO IS AWARDED REASONABLE ATTORNEY'S FEES UNDER § 1988 CANNOT BY VIRTUE OF A CONTINGENT FEE AGREEMENT BE REQUIRED TO PAY HIS ATTORNEYS AMOUNTS IN EXCESS OF THE AWARDED FEES.

A. Federal Courts Should Not Require Civil Rights Plaintiffs to Pay Their Attorneys More Than The Court-Awarded Fees.

As this Court has said, "[a] major purpose of the Civil Rights Attorney's Fee Awards Act was to benefit those claiming deprivations of constitutional civil rights." *Maine v. Thiboutot,* 448 U.S. 1, 9 (1980). This was accomplished by insuring that the successful civil rights plaintiffs would be able to have their attorney's fees paid. *See* 122 Cong. Rec. at 35117, Oct. 1, 1976 (Rep. Ashbrook). In *Hensley v. Eckerhart,* 461 U.S. 424, 435 (1983), the Court

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[6]As shall be addressed *infra,* state law precludes enforcement of the contingent fee contract under the facts of this case. That federal courts or Congress act to protect a client *vis a vis* the attorney does not preclude the state from providing greater protections. Note, *Fee Waivers and Civil Rights Settlement Offers: State Ethics Prohibitions After Evans v. Jeff D.,* 87 Col. L. Rev. 1214, 1226 (1987).

said, "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." The purpose of the legislation clearly was not to benefit lawyers, 122 Cong. Rec. at 33314, Sept. 29, 1976 (Sen. Kennedy), or to create "windfalls" for anyone. *Blanchard v. Bergeron, supra,* 109 S. Ct. 939, 946 (1989).

This Court has pointed out that civil rights cases are not viewed as simply another species of tort cases.

> We reject the notion that a civil rights action for damages constitutes nothing more than a private suit benefiting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely on monetary terms.

City of Riverside v. Rivera, 477 U.S. 561, 574 (1986). That is why "the enforcement of civil rights laws cannot be entrusted to private fee arrangements" (*Id.* at 579) or to tort system practices (which are fueled by insurance).

The goal of § 1988 should be implemented not only by the application of the statute itself, but also by the power of the Court to regulate attorney-client fee arrangements related to federal actions. *See Krause v. Rhodes,* 640 F.2d 214, 218-19 (6th Cir. 1981).[7] "The relevant principle is well established: a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Town of Newton v. Rumery,* 480 U.S. 386, 392 (1987).

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[7]The United States Supreme Court has exercised supervisory power over local rules relating to attorneys. *See Frazier v. Heebe,* 482 U.S. 641 (1987).

All of the rulings of this Court with respect to § 1988 fees are to insure that with respect to the parties and their attorneys, fees are reasonable. The Court has not immunized the attorney-client relationship from its scrutiny. Indeed, it would be anomalous for the Court to require the payment of a fee which exceeds the reasonable court-awarded fee, because such a fee is by definition unreasonable.

In *Blanchard v. Bergeron, supra,* 109 S.Ct. 939 (1989), the Court dealt with the effect of a private fee agreement on an award under § 1988. The Court held that a contingent fee agreement did not place a ceiling upon the fees recoverable by a prevailing plaintiff in a civil rights action. Although the case dealt with the amount to be paid by the defendant, the effect was to provide plaintiff's counsel with monies which exceeded the amount to which he was entitled under his contract with the client, because the attorney, in effect, has a direct interest in court-awarded fees. *See Evans v. Jeff D.,* 475 U.S. 717, 730 n.19 (1986).[8] Note, *Fee as the Wind Blows: Waivers of Attorney's Fees in Individual Civil Rights Actions Since Evans v. Jeff D.,* 102 Harv. L. Rev. 1278, 1295 (1989). There is no indication that the Court believed that the civil rights plaintiff could enforce the agreement with the lawyer and thereby keep the excess of the fees awarded as a "windfall." Indeed the Court suggested that the attorneys would derive that excess when it noted that its ruling would not result in a "windfall" to the *attorneys. Blanchard v. Bergeron, supra,* 109 S.Ct. at 946.

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[8]Whether or not the attorney has technical standing to apply for such statutory fees, the attorney makes the motion for fees in the name of the party but for the benefit of the attorney. Moreover, the contract in this case provided for the attorney's right in the fee award and even to apply for it. (R 260 p. 13 ¶ 8).

In *Blum v. Stenson,* 465 U.S. 886 (1984) the court held that a plaintiff is entitled to an award of attorney's fees under § 1988 even though the plaintiff was represented by a non-profit public interest law firm. Thus the plaintiff was awarded the fees, even though plaintiff had no obligation to the public interest law firm, which firms are generally precluded from having fee agreements with clients. *Evans v. Jeff D., supra,* 475 U.S. at 755 n.10 (dissenting opinion). No one could seriously contend that the plaintiff is entitled to keep the awarded fee monies. Indeed, public interest law firms derive a portion of their funding from these awards. *Id.* at n.7; Note, *Fee Waivers and Civil Rights Settlement Offers: State Ethics Prohibitions After Evans v. Jeff D.,* 87 Col. L. Rev. 1214, 1217 n.19 (1987) (NAACP Legal Defense and Educational Fund receives an average of 20% of its annual budget from court-awarded fees.). The Court ignored the relationship between the client and attorney — which provided for no fees — and required a fee award which would go to a lawyer not entitled to a fee from the client. This is another example of the Court fashioning a remedy directly benefiting the attorney irrespective of the plaintiff-attorney arrangement. Again, if the Court is to pierce the plaintiff-attorney relationship for the benefit of the attorney, it should also be willing to do so for the benefit of the client.

In *Blanchard,* the Court in support of its decision, set forth various considerations which are equally applicable to the issue in the instant case. The Court noted that if the contingent fee agreement limited attorney's fee awards, "an undesirable emphasis might be placed on the importance of the recovery of damages in civil rights litigation." 109 S.Ct. at 945. The Court added:

> The intention of Congress was to encourage successful civil rights litigation, not to create a special incentive to prove damages and shortchange efforts to seek effective injunctive or declaratory relief. Affirming the decision below would create an artificial disincentive for an attorney who enters into a contingent fee agreement, unsure of whether his client's claim sounded in state tort law or in federal civil rights, from fully exploring all possible avenues of relief. Section 1988 makes no distinction between actions for damages and suits for equitable relief. Congress has elected to encourage meritorious civil rights claims because of the benefits of such litigation for the named plaintiff and for society at large, irrespective of whether the action seeks monetary damages.

Id.

An attorney with an enforceable contingent fee contract would have the same "incentive to prove damages and shortchange efforts to seek effective injunctive or declaratory relief" whether or not a contingent fee agreement was a limitation on the award of attorney's fees.

The Court in *Blanchard* also referred to the purpose of § 1988, and indicated enforcement of a contingent fee contract was contrary to the statute. Thus, the Court said,

> As we understand § 1988's provision for allowing a "reasonable attorney's fee," it contemplates reasonable compensation, in light of all of the circumstances, for the time and effort expended by the attorney for the prevailing plaintiff, *no more and no less.* . . . And Congress implemented its purpose by broadly requiring all defendants to pay a reasonable fee to all prevailing plaintiffs, if ordered to do so by

> the court. Thus it is that a *plaintiff's recovery will not be reduced by what he must pay his counsel.*

Id. at 944 (emphasis added). Thus the Court made clear that the purposes of the act are served by the payment of reasonable attorney's fees to the attorney regardless of the fee contract between a plaintiff and his or her attorney.

To say that lawyers should be relieved from the obligations of a contingent fee agreement so that they can receive the full amount of the court-awarded fees, but that they are entitled to enforce their contingent fee agreement when it would mean they would receive more than the court-awarded or reasonable fee is not only illogical, but runs counter to the expressed underlying policies behind § 1988 as recognized by this Court.

The Ninth Circuit's position would lead to other bizarre results. The plaintiff with small or no damages would receive the benefit of § 1988's fee shifting approach. Such a plaintiff would be made whole. But a plaintiff, such as Venegas, who has suffered large damages, would not receive the full benefit of the fee shifting concept and would not be left whole. In short, the Ninth Circuit approach leads to the irony of discrimination against certain, more aggrieved, civil rights plaintiffs. Also, as this case demonstrates, the Ninth Circuit position can result in a successful civil rights plaintiff paying more attorney's fees than even the wrongdoing defendant.

The Court in *Blanchard* suggested the possibility that in determining a reasonable fee under § 1988, the contingency aspect is a "factor." *Id.* at 944-45; *see also Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987). To whatever extent the contingency factor is an element of the fee award, the fee award

represents a judicial determination of the reasonable amount of fees. The successful client should not have to pay to the attorney an amount in excess of a reasonable fee. Moreover, any "contingency factor" in court-awarded fees should provide sufficient incentive to attorneys to undertake the cases.

The Court in *Blanchard* also cited *Cooper v. Singer*, 719 F.2d 1496 (10th Cir. 1983), for the proposition that a § 1988 fee award should not be limited by a contingent fee agreement between the attorney and his client. 109 S.Ct. at 942-43 n.4. In this regard the court in *Cooper* (which was decided following an *en banc* hearing) stated,

> *We conclude that if the client's section 1988 fee award . . . is less than the amount owed to the attorney under the contingent fee agreement, then the lawyer will be expected to reduce his fee to the amount awarded by the courts. S*e *Wheatley v. Ford,* 679 F.2d 1037, 1042 [*sic*] (2d Cir. 1982). On the other hand, if the fee award is greater than the amount owed to the attorney under the contingent fee agreement, then the attorney shall be entitled to the full amount of the fee award.

719 F.2d at 1506-07 (emphasis added). Thus the court in *Cooper* made clear that the logic of the *Blanchard* holding compels the attorney "to reduce his fee to the amount awarded by the courts." The court in *Cooper* added, "We also conclude that Congress intended that the section 1988 fee award would fulfill the plaintiff's fee obligations." *Id.* at 1507.

In *Wheatley v. Ford*, 679 F.2d 1037, 1041 (2d Cir. 1982) the court stated that it was "concerned about the relationship between the section 1988 award and counsel's contingency fee arrangement with his client." The court stated,

"the civil rights statutes should not be construed to provide windfall recoveries for successful attorneys" and then concluded,

> This Court has the power to formulate a fee award designed to avoid such an extreme result. *Sargeant v. Sharp, supra,* 579 F.2d at 648. *See also* Model Code of Professional Responsibility, Canon 13 ("a contract for a contingent fee . . . should always be subject to the supervision of a court, as to its reasonableness"). Pursuant to this supervisory power, we hold that, to the extent counsel receives payment of the section 1988 statutory award, his claim for services rendered under his contingency fee arrangement with his client shall be deemed paid and satisfied. This result gives full effect to the Congressional desire to promote private enforcement by allowing citizens "the opportunity to recover what it costs them to vindicate these rights in court."

As the facts in the instant case demonstrate, to allow the attorney to enforce a contingent fee agreement in civil rights cases when the court has made an award of reasonable attorney's fees, would contravene sound public policy.

The federal courts' regulatory powers over attorney-client fee arrangements have been particularly pronounced in connection with contingent fee contracts. *See* 1 M. Derfner & A. Wolf, *Court Awarded Attorney Fees* 6-16 (1989) (hereafter "Derfner & Wolf").

An authority stated,

> The federal courts have employed their powers to limit private fee contracts.... While fee contracts between lawyer and client should ordinarily be enforced, the courts have noted: "Fee contracts between attorney and client are of special interest and concern to the courts. They are not to be enforced upon the same basis as ordinary commercial contracts," and that "special concern" is particularly applicable to contingent fee contracts.

Id.; see also Dunn v. H.K. Porter Co., Inc., 602 F.2d 1105, 1108-09 (3d Cir. 1979); *McKenzie Const., Inc. v. Maynard,* 758 F.2d 97, 101 (3d Cir. 1985); *International Travel, Etc. v. Western Airlines,* 623 F.2d 1255, 1277 (8th Cir. 1980); *R. Aronson, Attorney-Client Fee Arrangements: Regulation and Review - Report to the Federal Judicial Center* 74-118 (1980); F. B. Mackinnon, *Contingent Fees For Legal Services* (1964); 1 S. Speiser, *Attorneys' Fees* 81-128 (1973); Brimelow & Spencer, *The Plaintiff Attorneys' Great Honey Rush,* 144 Forbes 197 (Oct. 16, 1989) ("A startlingly large part of the recent massive damage awards goes to the lawyers."); Note, *Contingent Fee Contracts: Validity, Controls, and Enforceability,* 47 Iowa L. Rev. 942, 946, 949 (1962). An agreement between an attorney and client, particularly a contingent fee contract, is subject to such scrutiny because of the inherent unequal bargaining power of the parties and the risk of misunderstanding and even overreaching. 47 Iowa L. Rev. at 963 ("To ignore the possibility that lawyers may misuse contingent fee contracts would, of course, be unrealistic.").

As a result, courts are willing to render agreements unenforceable when they contravene public policy. The enforcement of contingent fee awards when the court has awarded attorney's fees in a civil rights case is particularly inappropriate.[9] Contingent fee contracts are often

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[9]We do not suggest that all fee shifting provisions should result in the ban of contingent fees. It should be noted that "[s]ystems with general two-way fee shifting commonly ban contingent fees." Rowe,

not enforceable when the attorney's financial interest in the outcome of the litigation is considered detrimental to an important state interest. *See* Model Code of Professional Responsibility of the American Bar Association, DR 2-106(C), EC 2-20; 41 U.S.C. § 254(a). The ABA Code of Professional Responsibility imposes substantial limitations upon contingent fee contracts. The provisions are, according to the drafter's footnotes, based upon Canon 13 of the former ABA Canons of Professional Ethics (adopted in 1908) which provides that the contingent fee must be reasonable and always subject to the supervision of the court as to its reasonableness. *See Krause v. Rhodes,* 640 F.2d 214, 219 (6th Cir. 1981).

Civil rights cases often involve sensitive matters and the expenditure of public funds. Often the cases can be resolved satisfactorily with small monetary relief, injunctive relief or declaratory relief. The availability of windfall contingencies may shift the emphasis to efforts to obtain large damages. In addition, contingent fee contracts, as the one in the instant case, often contain clauses which may inhibit the settlement of the dispute.[10] As set forth in the fee agreement in this case, the attorney is virtually a co-venturer in the litigation. In this regard, with respect to public interest cases, one authority has written,

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The Legal Theory of Attorney Fee Shifting: A Critical Overview, 1982 Duke L. J. 651, 673 .

[10]The agreement contains a clause (¶ 8) purporting to preclude Venegas from waiving attorney's fees. As to the enforceability of such a provision in light of the ruling in *Evans v. Jeff D.,* 475 U.S. 717 (1986), *see* M. Schwartz & J. Kirklin, *Section 1983 Litigation: Claims, Defenses, and Fees* 581 (1986); indeed in the state court action referred to *supra* at n.4, Mitchell claims that Venegas owed him a fiduciary duty to obtain Mitchell's consent to a settlement.

> [A]warding attorneys' fees based upon results fundamentally misconceives the role of the lawyer. A lawsuit is not an investment in a uranium mine in which the lawyer is a co-venturer. Rather it is an attempt by the plaintiff to obtain redress for a legal injury. To this endeavor attorneys contribute their time, advocacy skills, and professional judgment — not their capital. Fully compensating the attorneys for the time they have invested is therefore not only sufficient to provide the necessary incentives, but additionally is consistent with the function of lawyers to bring the disinterested professional judgment to their cause.

Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?,* 126 U. Pa. L. Rev. 281, 318 (1977).

The link between the size of the verdict on the recovery and the amount of compensation received by the attorney may not be appropriate in civil rights cases. The attorney recovers greater compensation for the same amount of work if damages sought and recovered are inflated. This is unfair to defendants and is inimical to the judicial system. On the other hand, if recoveries are not inflated, and the plaintiff recovers an amount to compensate him for his damages, any amount paid by the plaintiff to the attorney results in the plaintiff receiving less than that to which he was fairly entitled.

Interestingly, it has been suggested that courts award civil rights plaintiffs less fees than commercial rights plaintiffs. Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?,* 126 U. Pa. L. Rev. 281, 292, 310-11 (1977). Thus a civil rights plaintiff who has to pay his attorney would, on a percentage basis, generally have to pay more out of his recovery than a commercial plaintiff.

Moreover, it is certainly not fair that a successful civil rights plaintiff must have the financial obligation, in addition to his or her personal commitment, to enforce this Nation's civil rights laws.

Thus case law and policy support the rule precluding contingent fee payments which exceed the § 1988 court-awarded fee.

B. By Virtue of § 1988, Civil Rights Plaintiffs Should Not Be Compelled to Pay Their Attorneys More Than The Court-Awarded Fees.

Although § 1988 does not deal explicitly with many factors concerning its implementation, the Court has been creating guidelines to effectuate the statute's purpose. Thus, not only is the purpose of § 1988 relevant to the exercise of this Court's power to deal with fees and fee agreements in civil rights cases, but also the statute itself, as an independent ground, supports Venegas' position.[11]

Under § 1988, the court is to award reasonable attorney's fees. The fees are for the attorneys, whether or not paid or payable to the plaintiff. *See supra.* Indeed, in this case the court awarded specific amounts to specific attorneys.

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[11]Some fee shifting statutes made no reference to the disposition of fees between attorney and client. *See* 15 U.S.C. § 15 . Some statutes have provided that fee shifting provisions do not limit the amount of fees that an attorney and his client might agree upon between themselves. *See* statutes set forth in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 252-255 (1975). And some statutes expressly limit the attorney's recovery. *See* 1 Derfner & Wolf 5-47. Thus the absence of any provision dealing specifically with the attorney-client relationship does not necessarily signify an intent not to cover the attorney's recovery.

In light of this allocation, it would be unreasonable and not in conformity with the statute if the attorneys ignored the judge's allocation and claimed larger amounts. Indeed, courts can and do set aside private fee-sharing agreements when they depart from the allocation made by the court. *See In Re Agent Orange Product Liability Litigation,* 818 F.2d 216, 222-226 (2d Cir. 1987). By the same reasoning the statute should not be read to permit attorneys to continue to litigate against the plaintiffs for larger fees, when under the statute, the court has determined the reasonable fees to which the attorneys are entitled.

If § 1988 was not applicable to the plaintiff-attorney fee arrangement, the plaintiff in *Blanchard v. Bergeron, supra,* 109 S.Ct. 939 (1989) could refuse to pay to his attorney the difference between the contingent fee and the larger court-awarded amount. This is obviously illogical.

If § 1988 court-awarded fees do not supersede contingent fee agreements, there would not only be undesirable results, but the purpose of the statute and the intent of Congress would be frustrated.[12]

The intent of Congress and purpose of § 1988 was to insure that successful civil rights plaintiffs would have their attorney's fees paid by the court award while avoiding attorneys receiving "windfalls."

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[12]A statute could be interpreted so that it will not lead to unreasonable results so long as such an interpretation is consistent with the legislative purposes. *See Perry v. Commerce Loan Company,* 383 U.S. 392, 399-400 (1966). *See generally,* Note, *Intent, Clear Statements, and the Common Law; Statutory Interpretation in the Supreme Court,* 95 Harv. L. Rev. 892, 912-915 (1982); *Evans v. Jeff D., supra,* 475 U.S. at 743-45 (dissenting opinion).

The Court in *Blanchard,* in noting that a purpcse of § 1988 "is that a plaintiff's recovery will not be reduced by what he must pay his counsel," 109 S.Ct. at 944, is supported by the legislative history.

The report of the Committee on the Judiciary on this Act, 94th Congress, 2d Session, House of Representatives Report No. 94-1558, 1976 (hereinafter "H.R.") stated with regard to the recovery of attorney's fees, "The application of these standards will insure that *reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights, while avoiding windfalls to attorneys." H.R. at 9 (emphasis added).*

In the debates on the bill in the House of Representatives, Rep. Ashbrook said of the bill "My colleague . . . pointed out the thrust of this bill was, in effect, to put individuals into a position of not being harassed by the Government, and, if they are, then at *least allow them to seek redress for their grievances and be able to have their attorney's fee paid if they prevail."* 122 Cong. Rec. at 35117 (Oct. 1, 1976) (emphasis added).

In the Senate, the Judiciary Committee Report No. 94-1011 (hereinafter "S.R.") stated: "If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, *then citizens must have the opportunity to recover what it costs them to vindicate these rights in court."* S.R. at 2 (emphasis added).

Speaking of the bill in the Senate, Senator Tunney, who sponsored the bill in its original form, made it clear that the plaintiff was to pay no fee when he said:

> When Congress calls upon citizens . . . to go to court to vindicate its policies and benefit the entire Nation, Congress must also ensure that they have the means to go to court, and to be effective once they get there. *No one expects a policeman, or an officeholder, to pay for the privilege of enforcing the law. It should be no different for a private citizen. . . .*

122 Cong. Rec. at 33313 (Sept. 29, 1976) (emphasis added). After quoting from *Knight v. Auciello,* 453 F.2d 852 (1st Cir. 1972), the Senator continued, "We cannot hope for vigorous enforcement of our civil rights laws unless we, in the words of the *Knight* court, '*remove the burden from the shoulders of the plaintiff seeking to vindicate the public right.' That is what this bill does and why it is so vital."* 122 Cong. Rec. at 33314 (emphasis added).

That Congress opted for the court to determine the extent of the client's fee obligation was spelled out by Senator Kennedy, the sponsor of the bill that was passed. He took exception to those of his colleagues who called the bill "a lawyer's bill." He stated,

> Even with enactment of this bill, the lawyer who undertakes to represent a client will face more uncertainty of payment than one involved in a usual contingent fee case. *His fee is contingent not only upon his success, but also upon the discretion of the judge before whom he appears. . . .*
>
> Even if he wins his case and the judge decides he has won a fee as well, *his rate of compensation is fixed not by a grateful client, but by a disinterested judge.* In the traditional contingency case, the lawyer is assured of a high percentage of a monetary award should he win. If the proponents of this bill were interested in creating a relief fund for lawyers, they would have surely gone about it in a different way.
>
> No, this bill is not for the purpose of aiding lawyers. The purpose of this bill is to aid civil rights.

122 Cong. Rec. at 33314 (Sept. 29, 1976) (emphasis added).

The court in *Cooper v. Singer, supra,* 719 F.2d at 1504, said, "The Legislative history on this issue is sparse; nevertheless it seems to imply that the fee award should fully define the attorney's right to compensation"; *see also Kirchoff v. Flynn,* 786 F.2d 320, 323 (7th Cir. 1986) ("As the district court said, the (or a) policy behind § 1988 is to ensure that the plaintiffs keep the whole recovery.").

Certainly Congress never intended that attorneys in a civil rights case would be able to recover approximately eight times a generous court fee award and thereby deprive a civil rights plaintiff of close to 40% of his recovery. And it was never intended by Congress that successful civil rights plaintiffs must shoulder the economic expense of enforcing the civil rights laws.

To interpret § 1988 to govern in this case does not displace or preempt state law. There is no state law that requires the enforcement of contingent fees contracts. Indeed, as noted *infra,* the contract in the instant case violates state law.

The Ninth Circuit suggests that a limitation on contingent fee agreements "would discourage attorneys from agreeing to represent civil rights plaintiffs" and therefore would conflict with a purpose of § 1988. 867 F.2d at 532.

It is important to recognize that contingent fee agreements will likely only benefit a small percentage of the lawyers who handle civil rights cases. Most civil rights cases are handled by legal aid organizations. Few cases result in large damage awards. Indeed, a large percentage of cases involve only injunctive relief. *See Evans v. Jeff D., supra,* 475 U.S. at 755 n.7, 756 n.10 (dissenting opinion). That the availability of the contingent fee did not result in

attracting civil rights practitioners is demonstrated by the need for the enactment of § 1988.

The instant case demonstrates that court-awarded fees can be sufficient incentive to attract civil rights attorneys. The court awarded Mitchell twice the fee he would normally charge. Yet he now wants more than ten times his normal fee. Indeed the district court, in increasing the fee, gave credit for the contingency factor.

If the availability of contingent fees were a factor, one would expect that this would be reflected in the number of private filings of civil rights cases in the Second and Tenth Circuits after the announcement of their rules to limit attorneys to the reasonable fee provided by § 1988. The following comparison of the number of civil rights filings in the Second and Tenth Circuits with those in the Ninth and Third Circuits (in which contingent fee contracts have been held enforceable) indicates no impact of the rulings limiting contingent fees:

PRIVATE CIVIL RIGHTS FILING BY CIRCUIT[13]

YEAR	2D CIR	3D CIR	9TH CIR	10TH CIR
1980	940	878	1517	615
1981	1139	1002	1804	736
1982	1357	1077	1641	871
1983	1475	1221	1909	1019
1984	1587	1341	2258	1173
1985	1488	1372	2031	1117
1986	1512	1436	2049	1221
1987	1387	1404	2087	1162
1988	1462	1430	1959	1172

[13]Annual Report[s] of the Director of the Administrative Office of the United States Courts (1980) pp. 377-381, (1981) pp. 370-374, (1982) pp. 219-225, (1983) pp. 249-255, (1984) pp. 257-263, (1985)

Moreover, as the Court in *Cooper v. Singer, supra,* 719 F.2d at 1506–n.14, noted, if attorneys are not taking meritorious cases because the fees are inadequate, the courts are not fulfilling their obligations under § 1988 to award reasonable fees.

Finally, the notion that only the possibility of exorbitant fees, and not just fair compensation, is necessary to entice attorneys to handle civil rights cases is somehow inconsistent with this Court's pronouncements on the obligations of attorneys to provide legal services to those who cannot afford them. *Mallard v. United States District Court,* ___ U.S. ___, 109 S. Ct. 1814, 1822-23 (1989).

Other Supreme Court cases cannot be read to support Mitchell's position. The Ninth Circuit, in its opinion in this case, refers to the statement in *Evans v. Jeff D.,* 475 U.S. 717, 731-32 (1985) that Congress enacted § 1988 in order to add fee awards "to the arsenal of remedies available to combat violations of civil rights." 867 F.2d at 532. The Court was obviously referring to *remedies* such as damages, injunctive relief and declaratory relief. A contingent fee agreement between an attorney and client is not a remedy.

The plurality in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 483 U.S. 711 (1987) alludes to the possibility that there may be situations in which the damages may be significant enough to obtain counsel. But the plurality added it was not persuaded "that without the prospect of being awarded fees exceeding . . . reasonable payment, plaintiffs with such cases will be unable to secure the help that the statutes aimed to provide." *Id.* at 726. The dissenting opinion also notes that "plaintiffs

pp. 285-291, (1986) pp. 182-188, (1987) pp. 185-191, (1988) pp. 188-194.

might be able to hire counsel in any event through private contingency arrangements," but added that such a possibility was not considered sufficient and that was why Congress enacted § 1988. *Id.* at 744. The Court in *Delaware Valley* did not address the issue of the validity of contingent fee awards that would exceed court-awarded fees.

Moreover, holding that court-awarded fees supersede a contingent fee agreement does not necessarily have to invalidate all contingent fee agreements. Although the Court has not reached, and need not reach, the issue, it may be that if a plaintiff with a contingent fee contract elects to settle the case and waive court-awarded fees prior to an award of those fees (*Evans v. Jeff D., supra,* 475 U.S. 717), the plaintiff might arguably still be obligated under the contingent fee agreement. In the instant case it is the court determination of reasonable fees that supersedes the attorney-client arrangement.

Also a plaintiff may have a state law tort claim pendent to a civil rights claim. Such claims are common involving individual police misconduct. In these cases, the contingency agreement would be more appropriate for the tort, as there probably would be no state fee-shifting provision. Indeed, the plaintiff could lose on the civil rights claim, but prevail in the state tort claim. *See Paul v. Davis,* 424 U.S. 693, 699-701 (1976) . In such a situation the plaintiff is not a prevailing party for purposes of the fee award. *See, e.g., Raley v. Fraser,* 747 F.2d 287, 290-92 (5th Cir. 1984).

Thus for these reasons there could be a role for contingent fee agreements even if court-awarded fees limit the contingent fee in the event of a judgment on the civil rights claim.

There are cases suggesting that a contingent fee contract may be enforceable by the attorney regardless of the statutory fee award. *E.g., Sullivan v. Crown Paper Board Co., Inc.*, 719 F.2d 667 (3d Cir. 1983);[14] *Hamner v. Rios*, 769 F.2d 1404, 1409 (9th Cir. 1985) ; *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 923 (8th Cir. 1986).[15] But after *Blanchard*, such decisions make no sense, because, as argued *supra*, the client cannot enforce the contingent fee agreement against the lawyer when the fee award exceeds the amount recoverable under the contingent fee agreement.

Accordingly, this Court should establish that an attorney is not by virtue of a contingent fee arrangement entitled to receive from a civil rights plaintiff more than the court-awarded fees.

II

UNDER THE FACTS OF THIS CASE THE PLAINTIFF SHOULD NOT HAVE TO PAY HIS ATTORNEY MORE THAN THE AMOUNT OF THE § 1988 AWARD.

Even if there are occasions for counsel to obtain a fee in excess of that allowed by the court under § 1988, it is inappropriate for counsel to receive such a fee in this case. See *Hamner v. Rios*, 769 F.2d 1404, 1409 (9th Cir. 1985) (court empowered to supervise contingent fee agreements to avoid unreasonable results). And this is so whether or not the state law is applicable. It is clear that a district court abuses its discretion when it allows a fee based on a contingency fee contract without carefully considering the appropriate legal and ethical factors, including those relating to the reasonableness of fees set forth in DR 2-106(B) of the ABA Code of Professional Responsibility. *Hoffert v. General Motors Corp.*, 656 F.2d 161, 166 (5th Cir. 1981).

Federal courts can restrict or limit private fee agreements without recourse to state law. *Id.*; 1 Derfner & Wolf § 6.03 at 6-12.6 - 6-13. Indeed, the district court in this case declared that it had the discretion to determine that the contingent fee agreement was unenforceable. Both the district court and the Court of Appeals, however, simply determined that an attorney could receive more under a contingent fee agreement than the amount of the court fee award. Neither court considered the full factual picture, nor the relevant ethical and legal factors.

When Mitchell and Venegas executed the contingent fee agreement, the case was basically ready for trial. The case had been tried once before, and discovery and pleadings had been completed. The likelihood of a substantial recovery was great, as Venegas had already had a jury in state court award him $1 million. The trial lasted only one week. There is no indication that a lengthier trial was anticipated at the outset. Mitchell's alleged time on the matter was 216.4 hours. His co-counsel's alleged time was 125.6 hours.

Under the "contingent fee" agreement, Venegas paid Mitchell a $10,000 nonrefundable retainer. Thus Venegas was at risk, for if he lost, he would not only be subject to paying defendant's attorney's fees, he forfeited the

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[14]The court said, however, that an attorney should only recover both the statutory fee and the contingent fee (a "dual recovery") when the claim involves civil rights of broad significance and for a large class. 719 F.2d at 670.

[15]Some courts have noted the issue but have declined to express an opinion. See, *e.g., Boston & Maine v. Sheehan, Phinney, Bass & Green*, 778 F.2d 890, 896 n.6 (1st Cir. 1985); *Daly v. Hill*, 790 F.2d 1071, 1085 n.19 (4th Cir. 1986).

$10,000 "retainer." Mitchell had a 40% contingency for one trial only. Such a provision appears to be unusual.[16] *See* ABA Model Rules of Professional Conduct, comment to Rule 1.5 ("An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest."). Thus, in the event of a mistrial, appeal, and retrial, Venegas would presumably have to offer Mitchell still a larger percentage of any recovery or try to hire new counsel — which might be difficult because of problems of allocating fees among the various attorneys. That the attorney is free to withdraw as counsel after one trial and yet retain a 40% interest in any recovery is manifestly oppressive.

While there is some dispute as to what was said at the time, there is no dispute that Mitchell did not explain to Venegas the full ramifications of a right to a § 1988 award. Venegas had no idea of the likelihood and extent of the fees in the event he prevailed. Indeed, he was led to believe a recovery of fees was unlikely. As Venegas was in need of an attorney for a trial scheduled shortly thereafter, he had little bargaining power. There is no indication that he had any independent advice with respect to the

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[16]One authority on contingent fees notes that "a common pattern in personal injury litigation" is a "series of increasing percentage rates which are applicable to the recovery depending upon the stage in the prosecution which has been reached before recovery, e.g., one-quarter if settled before trial, one-third if recovered during or after trial, and 40% if recovered on appeal. . . ." F.B. Mackinnon, *Contingent Fees for Legal Services* 65-66 (1964). This is not to say a 40% fee is always unconscionable, but in this case that fee along with the one trial provision and other provisions render the agreement unconscionable. *See* Aronson, *Attorney-Client Fee Arrangements: Regulation and Review* 90-91 (1980) (as to whether certain percentages are unconscionable).

agreement. Certainly ethical standards and fiduciary responsibilities imposed upon Mitchell a duty to disclose fully all relevant factors and alternative fee arrangements before entering into the contingent fee agreement. *See* ABA Code of Professional Responsibility EC 2-19, 2-20, 5-7 ; ABA Model Rules of Professional Conduct, Rule 1.5 and comment thereto ("When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications.").

After the trial, Mitchell refused to handle the appeal without extracting additional compensation. Thus he withdrew as counsel before the case was completed and before any recovery.

Despite these facts, Mitchell and his co-counsel are demanding in excess of $800,000. That amounts to in excess of $2,300 per hour. With interest, this may well be even higher.

It must be remembered that although Venegas' judgment was substantial, it constitutes compensation for enduring several years in prison for a crime he did not commit. To now require him to pay 40% of that award to an already well-compensated attorney is hardly fair.

Even if a federal court is to review or supervise the propriety of the attorney-client fee arrangement in civil rights cases in which a fee has been awarded, it is clear that the district court's standard of review or supervision in this case was minimal. Indeed, it is difficult to conceive of a more appropriate case for judicial intervention.

The contingency in the contingent fee contract was the recovery of money. Contingent fee contracts have been interpreted to include appellate services and services to collect the judgment. *See* 1 S. Speiser, *Attorney's Fees* 116-

119 (1973 & Supp. 1988). Although the contract in issue purports to exclude the appeal, Mitchell was still obligated to collect and enforce the judgment. Having not completed his services, he should not be entitled to his contingent fee. Rather, at best, he should be entitled to *quantum meruit.* As discussed *infra,* this is the California rule which should be applicable. Moreover this should be the rule applied by the federal courts in their supervisory power over contingent fee contracts and the attorneys who appear before them. *See Estee Candy Co. v. United States,* 343 F.Supp. 1362 (Cust. Ct. 1972). There is no inconsistency between state law and the policies underlying § 1988. Thus state law principles can be applied by federal courts in § 1988 actions. *See Robertson v. Wegman,* 436 U.S. 584 (1978).

Under Mitchell's theory, once he tries the case, he and his co-counsel are entitled to $800,000 even though there may be an appeal, retrials and collection efforts yet to be performed by others. This cannot be the law.

In the event this Court adopts the principle that the attorney may in some circumstances retain a contingent fee in excess of a § 1988 award, the Court should make clear that such circumstances are not present in the instant case.

III

A FEDERAL COURT IN A CIVIL RIGHTS CASE SHOULD NOT UPHOLD THE REASONABLENESS OF A CONTINGENT FEE AGREEMENT WHICH IS UNENFORCEABLE UNDER STATE LAW.

The federal court should not deem reasonable or otherwise permit a contingent fee contract in a civil rights case which is not enforceable under state law. *See* 1 Derfner &

Wolf § 6.02 at 6-5[17]; *cf. Cook v. Moran Atlantic Towing Corp,* 79 F.R.D. 392, 394 (S.D.N.Y. 1978).

In the instant case, the contingency, i.e., the *recovery,* had not taken place at the time Mitchell was replaced as Venegas' attorney. Because of the appeal, any *recovery* was contingent.[18]

In *Fracasse v. Brent,* 6 Cal. 3d 784, 100 Cal. Rptr. 385, 494 P.2d 9 (1972), the California Supreme Court held that an attorney who has been discharged with or without cause by his client is not entitled to the full fee specified in the contract of employment but only the reasonable value of his services, upon the occurrence of any contingency contemplated by his contract.

Mitchell claims that by handling his "one trial only" he fulfilled his obligations and had a vested claim to a then unmatured and uncollected recovery. If the agreement were interpreted or enforced as Mitchell suggests, it would be against public policy. The contingency required a recovery, and it was Mitchell's obligation to effect the recovery whether or not he handled the appeal. *Dalzell v. State Bar,* 6 Cal. 2d 433, 438, 57 P.2d 1300 (1936) . Under *Fracasse v. Brent, supra,* 6 Cal. 3d at 784, Mitchell is only entitled to the reasonable value of his services.

Moreover, under California law, when a client is not fully informed of the availability of court-awarded fees, an attorney is not entitled to enforce the contingent fee agreement. Thus in *Denton v. Smith,* 101 Cal. App. 2d 841, 226 P.2d 723 (1951) the Probate Code provided for a fee to be fixed by the court, but the attorney attempted to

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[17]As noted *supra,* the court may apply "federal law" (1 Derfner & Wolf §§ 6.02, 6.03) so long as it is not less restrictive than state law.

[18]In Venegas' case there had already been two appellate reversals.

recover a greater amount under a contingent fee agreement. The court said,

> While he stated he read the contract, it does not appear that Denton informed him that the fees allowed to an attorney in the probate of an estate were set forth in the Probate Code. It would seem unreasonable to suppose that if Smith were informed of the percentage allowed as attorney's fees by law in probate proceedings, he would then have signed an agreement to pay several times that amount for services which would have been unnecessary under the circumstances disclosed.
>
> . . . It should be noted that defendant Smith had no independent advisor at the time and did not understand the contract; that plaintiff did not explain to him the limitations of attorney's fees allowed in probate matters. Under the circumstances, plaintiff was precluded from recovering more than a reasonable sum as attorney's fees for his services.

101 Cal. App. 2d at 844, 226 P.2d at 724-25 (citations omitted).

In the instant case, it is uncontradicted that Mitchell did not explain to Venegas the nature or likelihood of a § 1988 fee award and that Venegas did not have any independent advisor.

Moreover, California Business and Professions Code § 6147(a)(3) (West Supp. 1989) requires that every contingent fee contract provide "a statement that the fee is not set by law but is negotiable between attorney and client." This provision was included in the contract between Venegas and Mitchell. (¶ 4.) Venegas contends that the representation in the contract was not true because the fees are set by the court.

It is axiomatic that a federal court should not be a party to the enforcement of a contract which violates any law or contravenes public policy. *See United Paperworkers Intern. Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987); *see also* 1 Derfner & Wolf § 6.02 at 6-5 (general applicability of state law to fee agreements).

Inasmuch as the enforcement of the contingent fee agreement is manifestly contrary to state law, the federal court should declare its unenforceability and certainly should not uphold its reasonableness.[19]

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[19]In the event this Court does not by its decision render the contingent fee agreement unenforceable, the enforceability, including factual issues, will still have to be resolved. Indeed, in California the client can require fee disputes to be resolved initially by arbitration. Cal. Bus. & Prof. Code § 6200(c) (West Supp. 1989).

CONCLUSION

The judgment of the Court of Appeals should be reversed and the district court should be directed to deny Mitchell's motion to confirm a lien and insofar as such lien exceeds the § 1988 award on the ground that Mitchell's entitlement to attorney's fees is limited to the § 1988 award, and to order that Venegas' attorneys reduce the amount of their fees to the amount determined to be reasonable and awarded pursuant to § 1988.

Respectfully submitted,

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No. 88-1725

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

JUAN FRANCISCO VENEGAS,
Petitioner,

vs.

MICHAEL R. MITCHELL
Respondent.

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I RICHARD M. MOSK hereby certify that on November 17, 1989, I personally delivered by hand three copies of BRIEF FOR THE PETITIONER to the offices of Michael R. Mitchell, Esq., 4929 Wilshire Boulevard, Suite 910, Los Angeles, California 90010. I further certify that all parties required to be served have been served.

On November 17, 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Richard M. Mosk known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same. Subscribed and sworn to me.

Witness my hand and official seal.

S. Darlene Brasington
Notary Public and and for said county and state

OFFICIAL SEAL
S DARLENE BRASINGTON
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires MAR 12, 1993